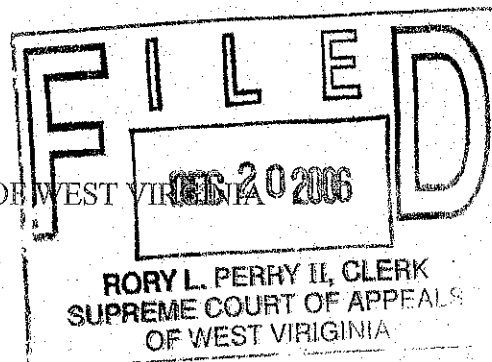


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



ANDREW MOTEN,

Appellant,

V.

CASE NO. 33220

F. DOUGLAS STUMP, COMMISSIONER
OF THE WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

Appellee.

FROM THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

BRIEF OF APPELLANT

ANDREW MOTEN

By Counsel

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POINTS AND AUTHORITIES

A. The Commissioner of Motor Vehicles must consider and give substantial weight to the results of the related criminal proceedings involving the same person who is the subject of the administrative proceeding before the Commissioner when evidence of such results are presented at the administrative hearing. Choma v. WV Division of Motor Vehicles, 557 S.E. 2d 310 (2001).

B. The Court has held that a driver's license is a property interest and such interest is entitled to protection of the due process clause of the West Virginia Constitution. Abshire v. Cline, 193 W.V. 180, 455 S.E.2d 549 (1995)

C. In a case involving the possible deprivation of a property interest, the defendant should be afforded the opportunity to present evidence that speaks his or her innocence. Adkins v. Cline 216 W.V. 504, 607 S.E.2d 833, 842 (2004) and Arbaugh v. Cline 216 W.V. 504, 607 S.E.2d 833, 842 (2004)

D. The Constitution of West Virginia, Article 3, Section 10 provides that no person shall be deprived of life, liberty or property without due process of law and the judgment of his peers.

E. State ex rel. Peck v. Goshuin, 162 W.V. 420, 249 S.E.2d 765 (1978).

STATEMENT OF THE CASE

Andrew Moten was arrested on October 19, 2003 in Mabscott, Raleigh County, West Virginia, for Driving Under the Influence of Alcohol. His arrest was occasioned by a BOLO allegedly received by the City of Mabscott. This alleged "BOLO" was received around

19:30 and describing a red truck with the registration tag belonging to the appellant. Approximately 45 minutes later, the Mabscott officer observed this vehicle, followed it, and says the vehicle made a wide turn. (Transcript p. 7) From Farley Hill, it is a distance of approximately 20 minutes drive from Mabscott and there exists numerous turns off. The officer offered no evidence as to the BOLO in the form of 911 transcript and/or record, other than his testimony.

There was no Intoxilyzer test, the officer had not been trained in the operation of the breath testing device, and was not certified in West Virginia at that time. The officer alleged that there was an odor of alcohol, blood shot eyes and slurred speech. (Transcript p. 7). The officer objected Mr. Moten to heel to toe, finger to nose, one legged stand and eye structure test for the field sobriety tests. The foundation for the field sobriety tests, according to the transcript, was limited to "before performing each test as demonstrated all the tests for Mr. Moten." (Transcript p. 7). There was never any evidence of any instruction given Mr. Moten, nor evidence as to the terrain upon which these tests were given, nor evidence of the officer's training or any compliance with regard to field sobriety testing standards. Moreover, there was no testimony about the eye structured tests. The finger to nose test was not a recognized test by any accrediting agency as to the validity in relationship to alcohol influence upon the body. The officer testified Mr. Moten could not perform the one legged stand tests because of medical problems. (Transcript p. 8). In the cross examination, it was revealed that Mr. Moten had numerous medical conditions, and was on permanent totally disability. He also did advise that Mr. Moten told him that he was not under the influence of alcohol. (Transcript p. 9).

The officer also advised Mr. Moten informed him that he had bitten by a snake thirteen (13) times and was taking Nitro for his heart problems. Mr. Moten also had health problems with his legs and back. (Transcript p. 15). The officer further conceded that Mr. Moten's blood shot eyes, slurred speech and fumbling for his license and paperwork could have been caused by various reasons unrelated to alcohol. (Transcript p. 18)

Based upon the testimony, the Commissioner entered an Order revoking the driving privileges of Andrew Moten. Prior to the start of the hearing, the license revocation counsel for Andrew Moten requested a continuance until the conclusion of the criminal matter, which said motion was denied.

The DMV hearing was held on May 5, 2004, and the Final Order was entered on August 23, 2004, which was timely appealed, and the Circuit Court Judge issued his ruling on December 15, 2005. Prior to the entry of the Final Order by the Circuit Court of Raleigh County on this matter here, Mr. Moten's criminal case was dismissed, as the Prosecuting Attorney of Raleigh County declined to further prosecute this matter.

ARGUMENT

A driver's license is a property interest.

Article 3, Section 10 of the Constitution of West Virginia provides that no person shall be deprived of life, liberty or property without due process of law and the judgment of his peers. Due process is synonymous with fundamental fairness. *State ex rel. Peck v. Goshuin*, 162 W.V. 420, 249 S.E.2d 765 (1978). A driver's license is a property interest. This Court has held a driver's license is a property interest and such interest is entitled to protection of the due process clause of the West Virginia Constitution. *Abshire v. Cline*, 193 W.V. 180, 455 S.E.2d 549 (1995). Thus due process does apply to the Department of Motor

Vehicle hearings. It is uncontested the appellant had a valid driver's license prior to the Department of Motor Vehicle revocation proceeding. Because the appellant had a valid driver's license, the Commissioner was required to provide him with due process before depriving him of this property interest. The appellant contends that the hearing before the Commissioner was insufficient due process in the he was denied the opportunity to gather and present certain favorable evidence on his behalf.

The DMV denied the appellant the opportunity to present favorable evidence in his defense.

In a case involving the possible deprivation of a property interest, the defendant should be afforded the opportunity to present evidence that speaks to his or her innocence. This Court held that the "Choma opinion applied to any judicial determination of administrative license revocation made after the date of Choma's filing." Adkins v. Cline 216 W.V. 504, 607 S.E.2d 833, 842 (2004).

The Choma opinion, which was filed on November 28, 2001, held that "the Commissioner of Motor Vehicles must consider and give substantial weight to the results of related criminal proceedings involving the same person who is the subject of the administrative proceeding before the Commissioner, when evidence of such results is presented in the administrative proceeding." Choma v. West Virginia Division of Motor Vehicles, 210 W.V. 256, 557 S.E.2d 310, 314 (2001). Therefore, any party charged with DUI after November 28, 2001 is entitled to have the results of his or her related criminal proceedings considered in his or her DMV proceedings when that evidence is presented.

In the current case, the appellant was charged with DUI on October 19, 2003, nearly two years after the Choma decision was delivered. Therefore, because the alleged DUI

offense occurred after the effective date of the Choma decision, the Appellant was entitled to have the results of his related criminal proceedings, if presented, considered in his DMV proceedings.

However, the DMV denied appellant's motion to continue the proceedings to await the outcome of the related criminal proceedings (Transcript p. 5). The DMV instead, went forth with its proceedings prior to any action on behalf of the State regarding Appellant's related criminal proceedings. Therefore, because the DMV denied the Appellant's motion to continue the hearing, the results of the appellant's related criminal proceedings were not considered in his DMV proceeding. In the DMV proceeding, the Commissioner revoked the appellant's license for DUI.

Subsequent to the Commissioner's revocation of the appellant's license, the State dismissed the criminal proceedings against the appellant. Had the Commissioner continued the hearing per motion of the Appellant, the Appellant would have been able to present the State's dismissal of criminal proceedings as evidence of his innocence.

In addition, the Choma decision also held that related criminal proceedings be "considered and given substantial weight." Id. at 314. Thus, by failing to continue its proceedings to await and consider the related criminal proceedings, the DMV denied the Appellant the right to present evidence that was (1) favorable to his case, and (2) entitled to substantial weight, in his defense. This action was detrimental to the Appellant's case and as a result the Appellant was deprived of his property interest.

Case law holds that a DMV revocation of a driver's license should be reevaluated when the related criminal proceedings are resolved and the license proceeding is still pending.

The holding of Choma requires the results of the criminal proceedings to be presented in order for them to be considered. Id. at 314. However, this Court has remanded cases in which the DMV proceedings took place prior to the criminal proceedings and therefore prevented the defendant from presenting those results in the DMV proceedings. Upon remand of those cases, the Court required the Commissioner to reevaluate those cases while considering and affording substantial weight to the results of the related criminal proceedings. Adkins v. Cline, 607 S.E. 2d at 842.

There are two cases on point in this issue, Adkins v. Cline, and Arbaugh v. Cline. In both cases, the Appellants, Adkins and Arbaugh, were arrested for DUI. The DMV proceedings were held prior to any criminal proceedings in both the Adkins and the Arbaugh case. In both cases, the Commissioner ruled that the parties were DUI, and subsequently revoked both Appellants' licenses. Both Appellants appealed the Commissioner's findings. Id. at 835.

While the appeals of the Commissioner's findings were pending, both cases reached their conclusions in the criminal proceedings. As a result of the criminal proceedings, the criminal charges against Mr. Adkins were dismissed, and Mr. Arbaugh was acquitted of criminal charges against him. Id. at 835. The lower courts then stayed the Commissioner's revocation orders of both Mr. Adkins and Mr. Arbaugh's license pending decision on the appeals. Id. at 835.

While both cases were pending appeal, this Court issued its opinion on Choma v. West Virginia Division of Motor Vehicles 557 S.E.2d 310. Because the revocation of Mr. Adkins' and Mr. Arbaugh's licenses had not been finalized, this Court held that Choma applied to their cases. Adkins v. Cline, 607 S.E. 2d at 842.

In both Adkins and Arbaugh, the defendants were unable to present the results of their related criminal proceedings in the DMV proceedings, because the criminal proceedings had not been concluded at the time of the DMV's proceedings. Id. at 836. As a result, Mr. Adkins and Mr. Arbaugh were denied the right to present evidence favorable to themselves in the DMV proceedings, and subsequently had their licenses revoked.

In Adkins' and Arbaugh's appeals of the DMV ruling, however, this Court affirmed the lower court's ruling that remanded the cases to the DMV Commissioner to be reevaluated in accordance with Choma. Id. at 842. In other words, the Court sent the cases back to the DMV to be reheard and ordered the Commissioner to give substantial weight to the results of the Appellants' related criminal proceedings.

The case at hand is similar to Adkins and Arbaugh. Like the Appellants in those cases, Mr. Moten was successful in his criminal proceedings. In fact, Moten requested a trial, and the State dismissed the charges against him. Unfortunately for Mr. Moten, the State's dismissal of criminal charges did not occur until after the Commissioner had plowed ahead with the DMV proceedings, along the way denying Mr. Moten's motion to continue to await the results of the criminal proceedings. By denying Mr. Moten's motion, the Commissioner once again, as in Adkins and Arbaugh, denied the Appellant the opportunity to present favorable evidence.

Similar to Adkins and Arbaugh, this case meets the requirements for Choma to apply. In both Adkins and Arbaugh, the operative facts occurred prior to the Choma deadline. However, the Court applied Choma to those cases because the revocation determinations had not been finalized. Adkins v. Cline, 607 S.E. 2d at 842. In the case at hand, the operative facts occurred almost 2 years after Choma went into effect. Therefore, this case is well

within the requirements of Choma, and it is at least as appropriate to apply Choma to this case as it was in Adkins or Arbaugh.

Because this case occurred after Choma went into effect, and because it has similar facts to Adkins and Arbaugh, the Court should reach a similar result, and remand this case to the lower court with instructions to remand this case to the Department of Motor Vehicles to reevaluate and afford substantial weight to the results of the related criminal proceedings. Wherefore, the Appellant respectfully requests the Court to Order the Court to remand this case back to the Department Of Motor Vehicles for a hearing to consider the effect of the subsequent dismissal of the criminal matter.

ANDREW MOTEN
BY COUNSEL

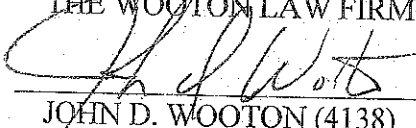
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Table of Authorities

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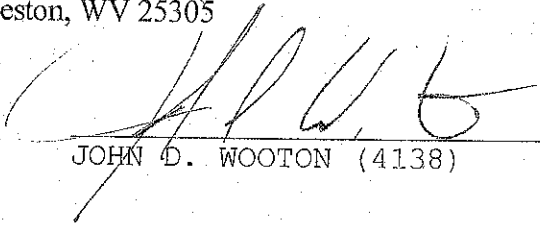
F. DOUGLAS STUMP, COMMISSIONER
OF THE WEST VIRGINIA DIVISION OF
MOTOR VEHICLES,

Appellee

CERTIFICATE OF SERVICE

I, John D. Wooton, counsel for Appellant, Andrew Moten,
do hereby certify that today a true copy of the foregoing
Brief of Appellant was this day mailed to the following by
first class mail, postage prepaid, this 18th day of December
2006.

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